Recommendation 93-1

Use of APA Formal Procedures In Civil Money Penalty Proceedings

(Adopted June 10, 1993)

Since 1972, the Administrative Conference has been encouraging the use of administratively imposed civil money penalties as an enforcement tool. In Recommendation 72-6, the Conference recommended Congress provide for such remedies, to be imposed after a hearing (usually presided over by an administrative law judge) pursuant to the Administrative Procedure Act's provisions in sections 554, 556 and 557, which govern formal adjudications. Congress has followed that recommendation in hundreds of contexts over the past 20 years, and administrative civil money penalties have become a frequent enforcement mechanism.

Congress has, however, in several recent environmental statutes, authorized the Environmental Protection Agency to impose civil money penalties without a formal APA hearing, without an ALJ, and without de nova judicial review. The Army Corps of Engineers and the United States Coast Guard have been granted similar authority. The amounts of potential liability under these statutory provisions vary from maximums of $5,000 up to as high as $125,000. The issue is whether this trend is a good one.

The Administrative Conference has made a number of recommendations that relate to this topic. In its first recommendation on this subject, Recommendation 72-6, "Civil Money Penalties as a Sanction," the Conference recommended that systems for administrative imposition of civil money penalties should provide for adjudications on the record after a formal hearing pursuant to the APA. It reiterated that position in Recommendation 79-3, "Agency Assessment and Mitigation of Civil Money Penalties."

In Recommendation 92-7, "The Federal Administrative Judiciary," the Conference considered the issue from a different perspective. In that recommendation, the Conference addressed the proliferation of non-ALJ adjudicators in agency proceedings, and encouraged Congress to return to a more consistent use of ALJs in the types of cases for which their use is most appropriate, so the uniformity of process and decision-maker characteristics that the APA envisioned could be reestablished. In proposals that presumed the implementation of recommended changes in the ALJ selection process and mode of performance review, the Conference suggested a set of

guidelines that Congress should use in determining when ALJs should be required as presiding officers. [1]

Among the types of cases cited by Recommendation 92-7 in which Congress should consider requiring ALJ hearings are those involving the "imposition of sanctions with substantial economic effect." While this is but one factor Congress is urged to take into account, it would appear to weigh strongly in favor of APA-ALJ proceedings in civil money penalty cases of the type at issue here. While the economic impact of a civil money penalty will vary depending on the respondent's resources, it can reasonably be assumed that a penalty of $25,000 would be substantial to most respondents, and even smaller penalty amounts might be substantial in many situations.

The interest in uniformity also weighs very much in favor of using APA-ALJ hearings in civil money penalty cases. Most administratively imposed civil money penalty statutes do in fact require APA-ALJ hearings. There does not appear to be anything particularly unusual about the cases engendered by the programs under study that would warrant a different type of hearing. As a matter of good policy, anyone facing a civil money penalty imposed by a federal administrative agency with judicial review on the record of the administrative proceedings should have available the opportunity to have his or her case heard by an ALJ in a formal APA hearing. Where penalties would be small, it is of course less likely that such an opportunity would be taken; where they are large, such an opportunity becomes that much more important.

While neither an APA hearing nor an ALJ as presider may be constitutionally required, there may well be situations where due process would require something very much like an APA-ALJ hearing. An advantage of uniformly requiring the opportunity for ALJ hearings in civil money penalty proceedings is that it alleviates the uncertainty that arises from trying to apply the standards of *Mathews v. Eldridge*[2] in a variety of contexts. That case, which requires a balancing of three, different interests in determining what process is due in a particular situation, provides no clear guideposts. Its requirements can only be determined definitively on post-hoc review. In contrast, the validity of the APA's formal adjudication process is well-established.

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[1] Non-ALJs can, of course, be used by agencies for adjudications not stipulated by Congress to be within the coverage of sections 554, 556 and 557 ("non-APA adjudications"), or in APA adjudications where Congress has specially designated a presiding board or non-ALJ adjudicator. See 5 U.S.C. 556(b). Recommendation 92-7 was intended to address both types of congressional actions.

[2] 424 U.S. 319 (1976).

The Conference is therefore recommending that, in all cases involving administratively imposed civil money penalties, the opportunity for a formal adjudication pursuant to the APA's provisions, 5 U.S.C. 554, 556-558, be available to parties.[3]

Recognizing the current existence of civil money penalty programs where the hearing officers are not protected by the APA's separation-of-functions provisions in section 554(d), the Conference is recommending agencies with such programs provide for this important protection by regulation. Agencies should ensure that non-ALJ presiding officers and presiding officers in non-APA hearings will not report to, be evaluated by, or consult with prosecuting or investigating officials.[4]

Although the Conference originally recommended use of administrative hearings in civil money penalty cases because of the comparative cumbersomeness and expense of federal district court trials, concerns have been raised that APA-ALJ hearings can also be too slow, expensive and cumbersome, and that some cases should therefore not be required to be adjudicated under the APA. This concern, which extends beyond civil money penalty cases, can, however, be addressed within the ambit of the APA.

The APA provides flexibility with respect to procedures used in formal proceedings. Although 5 U.S.C. 554, 556-558 contain certain basic requirements (such as proper notice, opportunity to present evidence and rebuttal, at least limited cross-examination, and the chance to submit proposed findings or exceptions), the APA leaves to agency discretion or other statutory provision such issues as the scope of discovery, the existence of time limits, and many evidentiary issues. Agencies should take advantage of such flexibility to issue rules that would encourage expeditious resolutions in ALJ proceedings.[5] For example, agencies could authorize (or require) limitations on discovery or the number of pages filed, or could set deadlines for the various stages of the proceeding, including the amount of time to issue a decision. They could

[3] The recommendation that the opportunity for a hearing be afforded is intended to retain flexibility for resolving the case prior to an ALJ hearing, through settlement, alternative dispute resolution processes, or other processes agreed upon by the parties.

[4] As reflected in Recommendation 92-7, "The Federal Administrative Judiciary," the Conference also recognizes that there may be infrequent situations where Congress may wish to specially designate presiding officers with technical or other specialized expertise for APA formal adjudications in civil money penalty programs. See section 556(b) of title 5. In these situations, the APA mandates a separation of functions.

[5] See, e.g., Recommendation 86-7, "Case Management as a Tool for Improving Agency Adjudication," 1 CFR 305.86-7 (1992).

also encourage the use of alternative dispute resolution in appropriate cases.[6] Thus, the uniformity provided by the APA does not and should not limit agency or ALJ flexibility in handling civil penalty cases expeditiously and fairly.

Recommendation

1. Congress should provide that the Administrative Procedure Act's formal adjudication provisions (5 U.S.C. 554, 556-558) are available to parties whenever money penalties may be imposed by administrative agencies.

2. Agencies should ensure in their regulations that non-administrative law judge presiding officers in civil money penalty adjudication proceedings not covered by the APA's formal adjudication provisions are protected from undue influence. Specifically, such officers should not report to, be evaluated by, or consult on an ex parte basis with, prosecuting or investigative officials.[7]

Citations:

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[6] See Public Law No. 101-552, the Administrative Dispute Resolution Act, which amends the APA to provide authorization to use alternative dispute resolution processes. See also Recommendation 86- 3, "Agencies' Use of Alternative Means of Dispute Resolution," 1 CFR 305.86-3 (1992).

[7] Recommendation 2 is intended to assure that separation-of-functions protections are included within existing programs. These very important protections would be required by Congress in future programs by Recommendation 1, which urges that all of the APA's adjudication safeguards be made available in new civil money penalty programs. It is unlikely that Congress would consider a civil money penalty adjudication proposal for which it would not be in the public interest to make available the full range of APA safeguards. However, should that unlikely event occur, it is strongly urged that Congress assure that at least separation-of-functions protections of the type described in Recommendation 2 be incorporated in any such program